

# One Less Way for Ohio Landowners to Challenge Royalty Severances

By J. Benjamin Fraifogl

On February 15, 2022, the Ohio Supreme Court issued a significant decision in *Peppertree Farms, L.L.C. v. Thonen* establishing that, unless expressly stated otherwise, an oil and gas royalty interest retained in a deed executed prior to 1925 is not limited to the lifetime of the grantor. In so holding, the Ohio Supreme Court cut off one of the only grounds, other than the Dormant Minerals Act and Marketable Title Act, for landowners to quiet title and eliminate past oil and gas severances.

Ohio follows a legal tradition under which the default rules of English “common law” were adopted and then adapted by statute to form the basis of our legal system. At common law, a conveyance of real property had to include “words of inheritance” (i.e., an express statement that the royalty interest would last in perpetuity and be inheritable) or the interest being conveyed would be limited to the lifetime of the grantee (a life estate). Additional complications arose when a grantor sought to retain an interest by deed. If the grantor was retaining a right which had already been conveyed to him in perpetuity, then the retention qualified as a “technical exception” of a pre-existing right and additional words of inheritance were not required. However, if the grantor was creating and then retaining a new right, the retention qualified as a “technical reservation” and was limited to a life estate.

As new modes of production and corresponding property rights were discovered, it became unclear exactly what rights pre-existed a severance and the whole system of distinctions fell apart. In 1925, the General Assembly passed a law establishing that all future conveyances of real property were presumed perpetual unless stated otherwise. While eliminating this issue as to future deeds, the General Assembly did not settle the issue as to deeds executed before 1925 or clarify whether the retention of an oil and gas royalty was a “technical exception” or “technical reservation.”

In the *Peppertree Farms* case, Plaintiffs Peppertree Farms, Jay Moore and Amy Moore (collectively, “Peppertree”) sought to quiet title to certain lands in Monroe County, Ohio, against a severed oil and gas royalty interest (the “Royalty Interest”) originally retained by the grantor under a 1921 deed. In addition to a claim for extinguishment under Ohio’s Marketable Title Act, Peppertree asserted that the Royalty Interest did not include words of inheritance and was therefore a newly created right which terminated upon the death of the grantor under the 1921 deed. Conversely, the defendant royalty owners (“Royalty Owners”) argued that the Royalty Interest was a pre-existing right which the grantor already held, and therefore could retain, in perpetuity without words of inheritance.

While Peppertree was able to convince both the trial and appellate court that the Royalty Interest was a newly created interest which was limited to a life estate, it was unsuccessful with the Ohio Supreme Court. Reasoning that a royalty was nothing more than the retention of part of the right to receive the proceeds of oil and gas production, the Court ultimately found that the Royalty Interest was a “technical exception” which survived the lifetime of the grantor. As a result, Peppertree was limited to its claims for extinguishment under the Marketable Title Act and Ohio surface owners lost another means to challenge ancient royalty reservations.

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